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5                   UNITED STATES DISTRICT COURT  
6                   EASTERN DISTRICT OF WASHINGTON

7                   UNITED STATES OF AMERICA	)	
8                   UNITED STATES DEPARTMENT OF	)	No. CV-07-3066-CI
9                   TRANSPORTATION, and FEDERAL	)	
10                  MOTOR CARRIER SAFETY	)	ORDER CERTIFYING FACTS FOR
11                  ADMINISTRATION,	)	CONTEMPT AND PERMITTING
12                  Petitioners,	)	PETITIONERS TO FILE MOTION
13                  v.	)	BEFORE U.S. DISTRICT JUDGE
14                  RICK T. GRAY, and R.T.G., LLC,	)	FRED VAN SICKLE
15                  Respondent.	)	----- ACTION REQUIRED -----

14                   On May 25, 2007, Petitioners filed an *ex parte* Motion for an  
15 arrest warrant against Respondent Rick T. Gray for civil contempt.  
16 (Ct. Rec. 18.) The court denied the *ex parte* Motion without  
17 prejudice and entered an Order directing Respondent to appear and  
18 show cause why facts should not be certified adjudging Respondent in  
19 contempt for failure to comply with a court Order. (Ct. Rec. 21.)  
20 A show cause hearing was held on July 30, 2007, at which Respondent  
21 Rick T. Gray appeared pro se. Petitioners are represented by  
22 Assistant United States Attorney Pamela J. DeRusha. Respondent Rick  
23 T. Gray represents himself. There has been no appearance on behalf  
24 of Respondent R.T.G., LLC. After testimony and oral argument, the  
25 court allowed the parties to file additional information prior to  
26 rendering a decision. (Ct. Rec. 26.)

27                   **CERTIFIED FACTS**

28                   The Federal Motor Carrier Safety Administration (FMCSA) is the  
  
ORDER CERTIFYING FACTS FOR CONTEMPT AND PERMITTING PETITIONERS TO  
FILE MOTION BEFORE U.S. DISTRICT JUDGE FRED VAN SICKLE - 1

1 governmental agency charged with ensuring compliance with Federal  
 2 Motor Carrier Safety Regulations (49 C.F.R. Chapter III). To carry  
 3 out these duties, the Secretary of Transportation is authorized to  
 4 enter facilities and issue administrative subpoenas requiring  
 5 appearance and the production of records in the course of  
 6 investigations. 49 U.S.C. §§ 502, 504, and 49 U.S.C. § 31133(a).  
 7 Respondent is a "for-hire" motor carrier, whose principal place of  
 8 business is located at 805 Skyline Drive, Sunnyside, WA 98944.

9 Respondent is the subject of Subpoenas directing him to appear  
 10 and produce specific documents before the Washington Division of  
 11 FMCSA in Olympia, Washington, for an investigation into alleged  
 12 safety compliance violations. (Ct. Rec. 1-3.) The subpoenas arise  
 13 from FMCSA's efforts to obtain records and information relating to  
 14 mandatory compliance reviews.

15 The Washington Division Office for FMCSA began its attempts to  
 16 contact Respondent in the spring of 2003, to conduct a compliance  
 17 review of Rick T. Gray, d.b.a Gray Farms, DOT #661991, due to  
 18 alleged noncompliance with federal safety regulations. (Ct. Rec. 2  
 19 at 2.) Those allegations include hours of service violations,  
 20 alcohol and controlled substance testing violations, inspection and  
 21 maintenance violations and other safety related issues. (Ct. Rec.  
 22 2 at 10-11.) After repeated attempts to schedule and conduct the  
 23 requested review, including a subpoena served on November 24, 2003,  
 24 and Mr. Gray's failure to appear or cooperate, FMCSA issued an order  
 25 to Cease All Transportation against Rick T. Gray on November 16,  
 26 2004. Respondent is prohibited from operating in interstate  
 27 commerce under the name Rick T. Gray. (Ct. Rec. 2 at 5.)

28 On January 13, 2004, Respondent applied for a new DOT number

1 under the name of R.T.G., LLC. Renewed attempts to contact and  
 2 schedule mandatory safety audits and compliance reviews in 2004 and  
 3 2005 failed. On May 9, 2005, the Washington Division of FMCSA  
 4 served a subpoena on Respondent, R.T.G., LLC, and its registered  
 5 agent, requiring it to appear at the agency office on June 6, 2005,  
 6 for investigation into the carrier's safety compliance. (Ct. Rec.  
 7 2 at 6.) On June 6, 2005, Respondent, R.T.G., LLC, informed FMCSA  
 8 that it would not be available for the noticed review. (Id.)  
 9 Respondent now represents his spouse filed for divorce in May 2005.  
 10 (Ct. Rec. 32 at 4.) After attempts to contact Respondent during the  
 11 rest of 2005 failed,<sup>1</sup> two administrative subpoenas to compel  
 12 Respondent to produce documents for review were issued on February  
 13 17, 2006. These subpoenas requested documents relating to Rick T.  
 14 Gray and R.T.G., LLC. (Id.) Attempts were made to reschedule the  
 15 review to accommodate Mr. Gray's schedule. When he appeared on  
 16 March 9, 2006, he failed to bring the summoned documents and claimed  
 17 they were lost by the airline. (Ct. Rec. 2 at 7; Ct. Rec. 30.) On  
 18 March 17, 2006, two more subpoenas for a compliance review and  
 19 safety investigation were issued for Respondent. Respondent failed  
 20 to appear or offer explanation for his non appearance. Thereafter,  
 21 Agency Counsel informed Respondent he could voluntarily submit to a  
 22 compliance review and safety audit.

23 The subpoenas issued in 2006 demand specific information  
 24 relating to duty status and hours of service, alcohol controlled  
 25 substance testing, inspection and maintenance history and the

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27                   <sup>1</sup>Respondent also now represents he buried his son on July 22,  
 28 2005. (Ct. Rec. 32 at 4.)

1 identity of individuals responsible for corporate safety-related  
2 management decisions. (Ct. Rec. 2 at 11.) After numerous  
3 unsuccessful efforts to serve Respondent with the subpoenas,  
4 Petitioners moved the court for summary enforcement of the  
5 subpoenas. (Ct. Rec. 1.)

6 On February 23, 2007, the court granted Petitioner's petition,  
7 and issued an Order to Comply or Show Cause. The court ordered  
8 service by the United States Marshals Office. (Ct. Rec. 8.) The  
9 Marshals Office was unable to locate Respondent within the time  
10 authorized (Ct. Rec. 9), and a second Amended Order to Comply  
11 extending the time for service was entered on May 25, 2007. (Ct.  
12 Rec. 15, 16.)

13 In the second Amended Order to Comply or Show Cause, the court  
14 directed Respondent to contact Ms. Cunningham within 15 days of  
15 service of the Order or show cause in writing within 10 days of  
16 service why he should not have to comply. (Ct. Rec. 15 at 4.)  
17 Respondent was personally served with the Order by the United States  
18 Marshal Service on June 7, 2007. (Ct. Rec. 17). As of June 25,  
19 2007, Respondent had not contacted Ms. Cunningham. (Declaration of  
20 Wendy Cunningham, Ct. Rec. 19 at 6.) Respondent did not contact the  
21 court until his appearance at the July 30, 2007, show cause hearing.  
22 At the hearing, Respondent testified that he did not believe he  
23 needed to contact FMCSA since he was in the process of going out of  
24 the trucking business. After the hearing, and within the time frame  
25 allowed by the court, he provided the court with documents in  
26 support of his testimony that the airline lost certain boxes that he  
27 was transporting, (although the contents of those boxes were not  
28 specifically identified) and that he was in the process of

1 discontinuing his trucking business. (Ct. Rec. 30.) However,  
 2 Respondent does not dispute that he failed to contact Ms. Cunningham  
 3 or explain in writing to the court why he should not be required  
 4 complete the compliance review, as directed in the court's Order.

5 A magistrate judge may certify facts for contempt proceedings  
 6 before a district judge and order the alleged contemnor to show  
 7 cause before that judge why contempt should not be adjudged in light  
 8 of the certified facts. 28 U.S.C. § 636(e); *Bingman v. Ward*, 100  
 9 F.3d 653 (9<sup>th</sup> Cir. 1996). Civil and criminal contempt actions are  
 10 distinguished on the basis of the nature of the relief requested; if  
 11 the relief is remedial, coercive or compensatory, the contempt is  
 12 civil. *Hicks v. Feiock*, 485 U.S. 624, 631-36 (1988); *International*  
 13 *Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 829  
 14 (1994). Here, the government represents it seeks imprisonment until  
 15 Mr. Gray arranges for his compliance review with Ms. Cunningham, and  
 16 requests a \$5000 cash bond to ensure he will complete the compliance  
 17 review. (Ct. Rec. 19.) Accordingly, this action is construed as a  
 18 request for a finding of civil contempt.

19 To succeed in a motion for civil contempt, the moving party  
 20 must show by clear and convincing evidence there was a violation of  
 21 a court order beyond substantial compliance, and that the violation  
 22 was not based on a good faith and reasonable interpretation of the  
 23 order. *Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322  
 24 (9<sup>th</sup> Cir. 1997).

25 The court has reviewed the factual submissions by Petitioners  
 26 and Respondent and concludes no further evidentiary hearing is  
 27 needed, as there is no dispute regarding Respondents' failure to  
 28 comply with the court Order entered on May 25, 2007. The file

1 confirms that Respondent was notified of the court's requirements  
2 via in-hand delivery of the Order by the United States Marshals on  
3 June 19, 2007. (Ct. Rec. 7, 9, 15, 22.) Nonetheless, Respondent  
4 chose not to comply with the Order. Respondent did not contact Ms.  
5 Cunningham, has not completed the compliance review, and did not  
6 explain in writing to the court within the allotted time why he  
7 should not have to appear or produce the subpoenaed documents as  
8 ordered. The court concludes these are sufficient facts to certify  
9 to the district court for contempt proceedings and so certifies.

If the United States chooses to proceed with this matter, the U.S. Attorney timely shall file a written motion instituting further contempt proceedings and note it for hearing before District Judge Fred Van Sickle.

14       **IT IS SO ORDERED.** The District Court Executive shall file this  
15 Order and provide a copy to Judge Van Sickle, Petitioners' counsel,  
16 and Respondents. Petitioners shall serve a copy of this Order on  
17 Respondent by personal service. Should Respondent not have the  
18 financial resources to secure the services of retained counsel, he  
19 may move this court for appointment of counsel prior to the hearing  
20 unless Petitioners' counsel indicates to the undersigned it will not  
21 seek jail time.

22 || DATED August 23, 2007.

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S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE

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